

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 06-10325-GAO

WILLIAM E. MCCARTHY, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ORDER
May 24, 2007

O'TOOLE, D.J.

The petitioner brings a petition for a writ of habeas corpus under the authority of 28 U.S.C. § 2241, apparently seeking to challenge the validity of the criminal sentence imposed on April 3, 1991, following his conviction by a jury of the crimes of conspiracy to possess cocaine with intent to distribute it and possession of cocaine with intent to distribute it. His conviction and sentence were affirmed on direct appeal, United States v. McCarthy, 961 F.2d 972 (1st Cir. 1992), and his later motion to set aside the sentence under 28 U.S.C. § 2255 was denied.

A petition under § 2241 is generally appropriate to challenge the manner of execution of a sentence, rather than its validity. See United States v. Barrett, 178 F.3d 34, 50 & n.10(1st Cir. 1999). Moreover, § 2255 itself provides that “an application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that . . . the court which sentenced him . . . has denied him such relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of the detention.” 28 U.S.C. § 2255. McCarthy was a “prisoner . . . authorized to apply for relief by

motion” under § 2255, and he actually did so, unsuccessfully. He still could conceivably be authorized to bring another § 2255 motion if he were able to get permission from the Court of Appeals to file a “second or successive” motion. See id.; 28 U.S.C. § 2244(b)(3).

The “savings clause” of § 2255 – permitting a habeas petition if “the remedy by motion is inadequate or ineffective to test the legality of the detention” – would not authorize the present petition under § 2241 in the event that approval for a “second or successive” petition is denied. “A petition under § 2255 cannot become ‘inadequate or ineffective,’ thus permitting the use of § 2241, merely because the petitioner cannot meet the AEDPA ‘second or successive’ requirements.” Barrett, 178 F.3d at 50.

The petition is dismissed.

It is SO ORDERED.

May 24, 2007
DATE

/s/ George A. O'Toole, Jr.
DISTRICT JUDGE